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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 278

HARRY NEEDELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1-9) is reported at 261 F. 2d 802.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1958 (Pet. App. B 10-11). A petition for rehearing was denied on July 6, 1959 (Pet. App. C 12-13). The petition for a writ of certiorari was filed on August 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was prejudicial error under 18 U.S.C. 3500 for the trial court to deny petitioner the right to inspect original notes made by a witness-agent in the course of his investigation, when the substance of those notes was made available to petitioner in the form of the complete case report drawn up from the notes.

STATEMENT

An indictment returned on October 18, 1955, in the District Court for the Southern District of Florida charged petitioner and one Waxman with a conspiracy to sell narcotic drugs not in pursuance of a written order in violation of 26 U.S.C. 4705(a) (R. 2). Their trial ended in a mistrial. On October 2, 1957, a second indictment was returned charging petitioner alone with fifteen substantive violations of 26 U.S.C. 4705(a). The first five counts charged sales of narcotics on different dates to one Miller, the second five counts, similar sales to one Garcia, and the last five, to one Buonaiuto (R. 3-11).

On motion of the Government (R. 13), the two cases were consolidated for trial (R. 14). On November 19, 1957, a jury found petitioner guilty on all fifteen substantive counts (R. 17-18).[1] The court thereafter granted a motion for a new trial as to counts 11 through 15 (R. 20) and, on motion of the Government, these counts were dismissed (R. 23). On

[1] At the conclusion of the Government's evidence, the court granted a motion for judgment of acquittal on the conspiracy charge (R. 17).

counts 1 through 10, petitioner was sentenced to pay a total fine of $5000 ($500 on each count) and to a term of imprisonment for two years on each, to run concurrently. The sentence of imprisonment was suspended and petitioner was placed on probation for three years (R. 21-22). The court of appeals affirmed.

1. The Government's evidence showed that petitioner, a licensed physician, when he was about to depart for a European vacation on August 6, 1955, left over one hundred and thirty signed prescriptions for codeine, demerol, and methadon (all narcotic drugs), to be delivered during his absence to some seven persons, including Miller, Garcia, and Buonaiuto, the three persons named in the substantive indictment. Some of these prescriptions were left in his office, the others in the Medical Arts Pharmacy, the drug store owned by his co-defendant, Waxman.

Two women assistants in petitioner's office, Misses Rossman and Fredericks (named but not indicted as co-conspirators in the conspiracy charge), testified regarding the arrangements petitioner made for running his office during his intended absence. Since Dr. Szekely, who was to take over petitioner's practice, had not received his state license to practice at the time of petitioner's departure, petitioner arranged that Dr. Grier (a licensed physician with a Government narcotic license (R. 347)) also be in the office temporarily (R. 50, 81).[2]

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[2] Both doctors were in the office until Dr. Szekely received his license on August 20th, two weeks after petitioner's de-

The office assistants further testified that petitioner instructed that the prescriptions be kept locked in a desk drawer. A prescription was to be delivered to the person in whose name it was issued when that person came in and paid a prescribed fee of five or ten dollars (R. 41, 83-86). Miss Rossman, who identified some thirty-one prescriptions (Pet. App. 6), testified that the persons to whom she delivered the prescriptions did not necessarily see or have any conversation with anyone else (R. 44). She said that during this period the usual office procedure was not always followed. Unless a patient particularly asked to see the doctor, his treatment card would not be sent in to the doctor nor would he be ushered in; he would see only her (R. 76-77). Miss Fredericks, who identified some twenty-nine prescriptions (Pet. App. 7), said that when a patient came in for one of these prescriptions, during this period, he would usually not talk to either Dr. Grier or Dr. Szekely (R. 86). When the prescriptions were delivered, the women were to, and did, write in the date of delivery opposite the words "to be filled," previously written on the prescriptions by Miss Rossman under petitioner's direction prior to his departure (R. 38, 41, 46, 85). The fees the women received were entered in a day book, and locked in the desk drawer (R. 42, 86).

The testimony of two pharmacists, likewise named as co-conspirators, identified some seventy-five prescriptions left by petitioner at the Medical Arts Pharmacy for Abe Bruches and his wife (Pet. App. 7; R.

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parture (R. 50, 81). Petitioner returned in seven weeks (R. 339). Neither Dr. Grier nor Dr. Szekely was called as a witness at the trial.

115-170). These prescriptions were kept in a safe (R. 121) and were dated and filled by a pharmacist when Bruches came in for drugs. Bruches came in practically every day during this period for the prescribed twenty-four 1-grain codeine tablets (R. 139, 158). He gave $2 to the pharmacist for the pills (R. 121), but at the same time usually left additional money to be retained for petitioner, allegedly for payment of a past debt to the doctor (R. 132, 145, 158). The unfilled prescriptions were collected from the drug store by petitioner upon his return (R. 157). At that time, petitioner also collected the money left for him by Bruches, a total of $175 (R. 256), two dollars and fifty cents more than the amount which would have been collected had the Bruches paid an additional $2.50 for each of the prescriptions which they had filled (R. 207, 391).

Two federal narcotic agents, Rudd and Waters, testified that they contacted petitioner at his office on September 22, 1955, after they had procured the prescriptions from the drug stores at which they had been filled. They stated that petitioner, confronted with some of these prescriptions, readily admitted that he had prepared them for "those addicts"—"Those people who are old opium and heroin and morphine users" (R. 189, 191-192, 255). Petitioner admitted that he had left the prescriptions with his office girls with instructions to collect ten or five dollars in return for them (R. 192, 210-211, 255, 258-259). He said that the prescriptions for the Bruches were left at the drug store so that they would be accessible in the event his office was closed (R. 211, 256). He said that

some of the persons for whom he had written the prescriptions had been cured of the narcotic habit (R. 208-209) and that he had talked with others about a supervised cure, but that they could not go to Lexington Hospital because of their jobs (R. 209, 255). He remarked that he thought it was wonderful that, by using methadon, these people could keep working and not have to go out on the street in order to buy heroin, morphine, or a derivative (R. 209, 255). He admitted that methadon was a narcotic drug but said that it was less habit-forming than morphine and that by furnishing it he believed that he was shortening his patients' addiction to drugs (R. 209). He said that one tablet was equivalent to one dose or "one shot" of narcotics (R. 210, 255) and that he prescribed twenty-four tablets on one prescription because his patients told him that they needed it (R. 210).

The agents testified that, at subsequent interviews, petitioner, his two office girls, and co-defendant Waxman, identified police file photographs of some of the people for whom petitioner had prescribed narcotics (R. 217-218, 260). All persons receiving prescriptions, except one, were familiar to narcotic agent Rudd in connection with his official duties (R. 213).

Petitioner testified that the narcotics were prescribed in the course of his professional treatment of the persons receiving them (R. 345). He denied having had knowledge that any of the people whom he said he treated had been involved in narcotic violations (R. 377), and having admitted to the agents that he knew that his patients were addicts (R. 370).

2. After the mistrial on the conspiracy charge, but prior to the time of the consolidated trial, petitioner moved the court for an order permitting the inspection of "books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified * * *, made by * * * Rudd during his investigation and preparation for trial * * *." The motion alleged that Rudd's testimony in the previous trial had shown that such contemporaneous notes were of the events and activities related to his testimony, and that inspection of them was material and necessary for the preparation of a defense (R. 11-12). The motion was granted only to the extent of permitting inspection of any documents or material taken from the defendants (R. 15).

At the consolidated trial, when agent Rudd was asked what percentage of petitioner's prescriptions he had found to be filled at various pharmacies, he indicated that, if he could look at his "report" or check his "files", he could tell exactly (R. 231, 233). The agent indicated that the information he needed was not available in the courtroom. The court asked him to bring in the records after he was excused from the stand (R. 232). Before Rudd left the stand, defense counsel questioned him as follows (R. 241):

> Q. You made copious notes, did you not, at the time you started the investigation of this case?
>
> A. I made several notes; yes, sir.
>
> Q. And you have refreshed your recollection from the notes that you made, refreshed your memory? Before coming to testify you re-

> freshed your memory by reference to those notes, did you not?
>
> A. Yes, sir.

Counsel then asked about the agent's examination of the files of the doctor and of the druggist (R. 241-242). During a short recess after redirect examination of of agent Rudd, there was apparently a conversation, which is not reported, between counsel and the trial judge out of the presence of the jury. The record contains merely the statement of the court (R. 248):

> I will deny the request for the notes, because they may involve many things. You may see the case report.[3]

A copy of the case report is filed herewith. It is signed by both agents Rudd and Waters and is dated October 31, 1955, some six weeks after the agents began an active investigation of the case on September 21, 1955. It covers every aspect of the Government's case including a narrative statement, a list of exhibits, and a list of witnesses and their anticipated testimony. It recites that Rudd himself would testify as to interviews with petitioner during this initial investigation. In this regard it states, *inter alia* (p. 18), that petitioner "voluntarily and spontaneously stated that he had left those prescriptions with 'those addicts' when he left for Europe. That they

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[3] The United States Attorney's Office has advised that, according to the best recollection of agent Rudd and the Assistant United States Attorney who prosecuted this case, an undeleted copy of the complete case report was handed to petitioner's attorney pursuant to the court's statement.

were all addicts and had used opium, heroin, morphine and dilaudid, that he gave it to them to keep them comfortable, and so that they could keep going and stay on their jobs and so that they would not go out on the streets looking for heroin or dilaudid. * * * [T]hat he thought it was wonderful that 'those addicts' * * * were only taking Methadon and not using any heroin or dilaudid at exorbitant prices." The report recites further that petitioner said that he had discussed with the addicts the possibility of a cure at Lexington but they could not or would not go since they worked for a living. It recites that he admitted arranging to leave prescriptions at his office and at Waxman's pharmacy with instructions for prescribed fees (pp. 18, 19).

ARGUMENT

Petitioner argues that, when a government agent testifies at a trial, the defendant is entitled, as a matter of right, to *all* his notes relating to the subject matter of his testimony. This argument is fully consistent with petitioner's broad demand at his trial for all of agent Rudd's notes relating to the case in any way. Petitioner's pre-trial motion had asked for "the contemporaneous notes made by the Government witness, Kenneth Rudd, * * * during his investigation and preparation for trial * * *." And apparently his demand during the examination of Rudd was at least equally broad, for the trial judge, in denying the request for the notes, stated that he was doing so because the notes "may involve many things."[4]

[4] Petitioner does suggest at one point (Pet. 12) that he is claiming only the right to agent Rudd's notes of the

Answering the same contention petitioner raises here, the court of appeals held that the notes of an investigative agent "are not strictly" within the terms either of *Jencks* v. *United States*, 353 U.S. 657, or of the "Jencks" Act, 18 U.S.C. 3500, which was passed before petitioner's trial (Pet. App. A 8-9). Therefore, the court held that, as to such notes, the discretion of the trial judge, recognized in *Goldman* v. *United States*, 316 U.S. 129, 132, was left undisturbed by the *Jencks* decision and statute. In the *Jencks* case, this Court held that the trial court had no discretion to withhold from the defense the "*reports* of Matusow and Ford in [the Government's] possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial" (emphasis added). 353 U.S. at 668. Similarly, the "Jencks" statute requires production only of "statements." And as this Court found in *Palermo* v. *United States*, 360 U.S. 343, 350, one of the reasons Congress limited the scope of 18 U.S.C. 3500 to "statements" was because it "strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest * * *."

The material in issue here is not a report or statement of an agent, but rather his own notes, his work product, for use in preparing his report for submission to his superiors. An investigative agent, like

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interview with petitioner, but his argument in the petition, as well as his demand in the trial court, extends much further.

any other person, may well have a method of recording events in some abbreviated or symbolic fashion which would be unintelligible to another person. The notes may require association with subjective reasoning processes of his mind or even the application of a personal code before they can be interpreted. While such raw notes may be a writing, they are not a report or a statement. See *McGill* v. *United States*, C.A.D.C., No. 14,792, decided August 20, 1959, where the court held that a detective's notes, which he had read to refresh his recollection prior to testifying, were not a statement required to be produced under 18 U.S.C. 3500.

Considered in this light, the decision of the court of appeals here is clearly not in conflict with the decision of the Second Circuit in *National Labor Relations Board* v. *Adhesive Products Corporation*, 258 F. 2d 403 (C.A. 2) (see Pet. 15-17). The Second Circuit held that, since the *Jencks* decision, the trial court does not have discretion to withhold from the defense a *statement* by the witness which relates to the subject matter of his testimony and which he used to refresh his recollection before he testified, even if he did not use it on the stand. Undoubtedly, notwithstanding *Goldman* v. *United States*, such a statement is subject to production under both the *Jencks* decision and the statute, regardless of whether the witness used the statement to refresh his recollection prior to or at the trial, and there is nothing in the opinion below to the contrary. In the present case, petitioner received Rudd's statement in the case report, which is the equivalent of the statement which

the Second Circuit held in the *Adhesive Products* case should have been turned over. The question tendered here as to whether the defense is also entitled, as a matter of right, to notes from which such a statement is compiled, was not before the Second Circuit in that case.[5]

Whatever may be the implications of the *Jencks* decision and statute vis-à-vis *Goldman* in other circumstances,[6] here the Government turned over to the defense the case report of agent Rudd. This report was the statement of the agent to his superiors and was therefore adopted by him. It was a complete and comprehensive statement covering every aspect of the Government's case. The evidence which the Government expected to develop at trial, including that gained through interviews with petitioner and others, was recorded in minute detail.[7] And the report contains internal evidence that it was prepared from the agent's working notes and encompassed the substance of those notes.[8] Nevertheless,

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[5] Petitioner's position is not substantially enhanced by the fact that agent Rudd used the notes to refresh his recollection before testifying. This fact has no relevance to whether the notes are a report under the *Jencks* decision or a statement under the "Jencks" Act.

[6] As, *e. g.*, where an agent's own notes are the only record in the Government's files of an interview which later became the subject of the agent's testimony.

[7] Significantly, petitioner made no attempt to use the detailed account of Rudd's interview with petitioner or any other part of the report to impeach Rudd's testimony.

[8] The record confirms this internal evidence. Rudd (as well as agent Waters) recounted, as to the question whether petitioner dispensed the drugs in good faith in the course of

petitioner has made a broad demand for all of agent Rudd's notes, including those completely unrelated to the interview between Rudd and petitioner which petitioner now claims is particularly "of vital importance" (Pet. 12). Under these circumstances, especially where petitioner made no request for "specific documents" (cf. *Palermo* v. *United States*, *supra*, 360 U.S. at 345; *Jencks* v. *United States*, *supra*, 353 U.S. at 666-667), the trial court clearly acted within the scope of its proper discretion.

In any event, whether or not the notes were subject to production, the situation here seems parallel to that in *Rosenberg* v. *United States*, 360 U.S. 367, 370-371. There, this Court held that, although a letter signed by the witness should have been turned over to the defendant, the failure to do so was not

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bona fide treatment, that petitioner readily admitted during the interview, without prompting, that he had written the prescription for "those addicts"—"old opium and heroin and morphine users" (R. 192, 255). The case report recites almost identically that petitioner voluntarily and spontaneously stated that he left prescriptions with "those addicts" and that the addicts had used "opium, heroin, morphine and dilaudid" (p. 18). Similarly, both the testimony and the case report stated that petitioner further said that it was "wonderful" that these persons could by using his prescriptions keep working and not have to go out on the street to buy heroin or a derivative (R. 209, 255; Rept., p. 18). Both recounted petitioner's explanation of the arrangements made for the prescriptions before his departure for Europe (R. 210-211, 255-259; Rept., pp. 18-19) and identically recited many other particulars. Since Rudd testified that prior to the trial he refreshed his recollection from his *notes*, it seems clear that, especially as to the interview with petitioner, the case report is the formal expression and recording of the notes.

prejudicial error since the defense had obtained the same information by other means. Similarly, it can be said here that, since the same information that would have been afforded was already in the possession of the defense (via the case report), the petitioner could not have been prejudiced by his lack of opportunity to inspect the notes.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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